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Federal Courts—Rx for Federal Anticipatory Relief in State Criminal Proceedings—Steffel v. Thompson, 415 U.S. 452 (1974)

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FEDERAL COURTS—R_X FOR FEDERAL ANTICIPATORY RELIEF IN STATE CRIMINAL PROCEEDINGS—*Steffel v. Thompson*, 415 U.S. 452 (1974).

In the fall of 1970, plaintiff Richard Steffel participated in the distribution of anti-war leaflets at a shopping center in De Kalb, Georgia. Under threat of arrest from police officers who had been summoned by the shopping center management, he and his companions dispersed. Two days later, however, Steffel and Sandra Lee Becker, another member of the group, returned to the center and resumed handbilling. Police again threatened them with arrest. Although Steffel departed, his companion Becker remained. The police arrested her for criminal trespass.[1] Steffel subsequently invoked the Civil Rights Act[2] and sought a declaratory judgment and injunctive relief[3] in federal court arguing that because he had desired to return to the shopping center to distribute handbills, but had not done so because he feared arrest, the Georgia criminal trespass statute violated his constitutional rights under the first and fourteenth amendments.[4] The district court denied relief;[5] the Court of Appeals for the Fifth Circuit affirmed.[6] On certiorari, the United States Supreme Court reversed. *Held:* Where no state criminal proceeding is pending at the time a federal complaint is

1. Becker was charged with violation of GA. CODE ANN. § 26-1503 (1972), which provides in pertinent part: "(b) A person commits criminal trespass when he knowingly and without authority . . . (3) Remains upon the land or premises of another person . . . after receiving notice from the owner or rightful occupant to depart. (c) A person convicted of criminal trespass shall be punished as for a misdemeanor." Defendant's prosecution was stayed until a final determination on the merits of Steffel's challenge to the statute could be made.

2. 42 U.S.C. § 1983 (1970). The Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

28 U.S.C. § 1343 (1970) vests original jurisdiction in federal district courts to redress such alleged deprivations. Notably, the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1970), does not itself grant jurisdiction to the federal courts.

3. On appeal to the Court of Appeals for the Fifth Circuit, plaintiff Steffel abandoned his claim for injunctive relief. Steffel v. Thompson, 415 U.S. 452, 456 n.6 (1974).

4. The complaint was originally filed as a class action naming as plaintiffs: Steffel, suing through his father because he was a minor; Sandra Lee Becker, who had been arrested and who also sued through her father as a minor; and the Atlanta Mobilization Committee. Only Steffel appealed the district court's denial of all relief. *Id.* at 456 n.5.

5. Becker v. Thompson, 334 F. Supp. 1386 (N.D. Ga. 1971).

6. Becker v. Thompson, 459 F.2d 919, *reh. denied*, 463 F.2d 1338 (5th Cir. 1972).

filed, the plaintiff is entitled to a declaratory judgment if he can show that there is a genuine threat of prosecution under a state statute allegedly unconstitutional either on its face or as applied. *Steffel v. Thompson,* 415 U.S. 452 (1974).

The problem of securing anticipatory relief[7] in federal court from the enforcement of allegedly unconstitutional state statutes has been the subject of a long-standing jurisprudential struggle. Under the standards that have developed, not only must a plaintiff satisfy the statutory prerequisites for injunctive[8] or declaratory relief,[9] but a party seeking a federal forum in which to challenge a state criminal statute must contend with an elusive mix of abstention,[10] equity, comity, and federalism.[11]

7. The term anticipatory relief is used to encompass both the injunctive and declaratory remedies. The issuance of a declaratory judgment, however, is governed by statutory as well as equitable principles. *See, e.g.*, Gordon Johnson Co. v. Hunt, 102 F. Supp. 1008 (N.D. Ohio 1952); Bakelite Corp. v. Lubri-Zol Dev. Corp., 34 F. Supp. 142 (D.C. Del. 1940); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). The remedy is more precisely *sui generis*, having both equitable and legal characteristics. *See* Beacon Theaters v. Westover, 359 U.S. 500 (1959) (jury trial available in declaratory judgment action where issues in controversy were legal in nature). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 449–50 (2d ed. 1970) [hereinafter cited as WRIGHT].

8. 28 U.S.C. § 2283 (1970). The antipathy towards federal intervention in state court proceedings by injunction was expressed in legislation as early as 1793. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335 (codified at 28 U.S.C. § 2283 (1970)). That Act prohibited the issuance of an injunction by a federal court to stay proceedings in any state court. Congress enacted the existing exceptions to this general proscription in Act of June 25, 1948, ch. 646, 62 Stat. 869 (codified in Judicial Code of 1948, 28 U.S.C. §§ 1251 *et seq.* (1970)).

9. 28 U.S.C. §§ 2201–02 (1970). The Declaratory Judgment Act was passed in 1934 to create a new remedy for the federal arsenal. *See* S. REP. No. 1005, 73d Cong., 2d Sess. (1934).

Justice Brennan traced the history and purpose of the Act at length in his separate opinion in *Perez v. Ledesma*, 401 U.S. 82, 111–15 (1971). He contended that the Act "was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether." *Id.* at 115. Justice Brennan further stated:

> [T]he Senate report's clear implication that declaratory relief would have been appropriate in [certain named cases] . . . and the report's quotation from *Terrace v. Thompson*, which also involved anticipatory federal adjudication of the constitutionality of a state criminal statute, make it plain that Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes.

Id. (citations omitted). *See* S. REP. No. 1005, 73d Cong., 2d Sess. (1964), *quoted at* 401 U.S. at 111–12.

10. The Supreme Court has recognized circumstances in which a federal court should decline to decide a controversy involving state law even though it has jurisdiction either under the Constitution or by statutory provision. Under this policy of abstention, a federal court will not interfere in state proceedings even to adjudicate federal claims where considerations of comity, convenience and avoidance of multiple litigation outweigh the potential for delay in the state court and possible jeopardizing

In the Supreme Court's application of these doctrines, different tests have evolved to determine whether anticipatory relief should be granted. The availability of such relief depends on the status of the state prosecution and the type of relief requested. As a result of this sometimes erratic evolution, three discrete patterns can be identified which involve anticipatory relief from prosecution under an allegedly unconstitutional state criminal statute. In the first pattern, some state prosecutorial action has been taken when the federal plaintiff seeks either an injunction against continued prosecution or a declaratory judgment as to the constitutionality of the challenged statute. The second pattern involves the request for injunctive relief when state

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of constitutional protections. *See generally* Note, *Abstention: An Exercise in Federalism*, 108 PENN. L. REV. 226 (1959). In clearly enunciating the doctrine for the first time, the Court found:

> a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary.

Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 494, 501 (1941). Since the *Pullman* decision, the abstention concept has been applied in various contexts. Indeed, Professor Wright identifies four discrete abstention doctrines. *See* WRIGHT, *supra* note 7, at 196–208. However, as the Court noted in Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972), the factors governing the propriety of abstention are separate from the question of whether a particular plaintiff may be entitled to injunctive or declaratory relief. This distinction can become difficult because the policy of abstention is closely related to principles of equity, comity, and federalism, determinative factors according to *Steffel* in awarding anticipatory relief. *See* Spears, *The Supreme Court February Sextet: Younger v. Harris Revisited*, 26 BAYLOR L. REV. 1, 20 n.101 (1974).

11. The Court in *Steffel* identified "equity, comity, and federalism" as a shorthand notation for the principles militating against federal interference in state criminal prosecutions. 415 U.S. at 460. This combination of principles comes from the Court's decision in Younger v. Harris, 401 U.S. 37 (1971). *See* notes 21–25 and accompanying text *infra*. "Equity" encompasses the doctrine that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43–44. The terms "comity" and "federalism" are often used interchangeably by the Court. Comity refers to the more general principle that courts of one jurisdiction will give effect to the judicial decisions of another out of deference rather than obligation. *See* Mutual Life Ins. Co. v. Johnson, 293 U.S. 335 (1934), where Justice Cardozo viewed comity as a means for avoiding unnecessary collision between state and federal courts. Federalism involves the notion of comity as it applies to relations between the federal and state systems. As the Court stated in *Younger*:

> [T]he notion of 'comity' [requires] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism". . . .

401 U.S. at 44.

prosecution is threatened but not pending.[12] In the third situation, prosecution is again threatened and not pending, but the plaintiff seeks a declaratory judgment that the state criminal statute is unconstitutional.

The *Steffel* decision represents the first articulation of a distinct test for deciding whether anticipatory relief is appropriate in the third pattern. This note will review the development of these patterns and the

12. The circumstances under which a threatened state prosecution becomes pending are not altogether clear. Generally the courts have considered the point of indictment to be the critical stage. *See, e.g.*, Younger v. Harris, 401 U.S. 27 (1971). Justice Rehnquist, on the other hand, concurring in *Steffel*, would look to the time of arrest. 415 U.S. at 480. Chief Justice Burger, in Allee v. Medrano, 416 U.S. 802, 842–43 (1974), views the time of filing charges as significant in a state criminal proceeding. *See* notes 39–43 and accompanying text *supra*. Under the latter test, there could never be federal anticipatory relief if a prosecutorial threat was required before the federal plaintiff would have the requisite standing on which relief could be granted. Since no relief could be granted after a threat, there would be no time at which relief could be granted. *See* note 53 and accompanying text *infra*.

Alternative propositions may be noted as well. In Burak v. Commonwealth of Pa., 339 F. Supp. 534, 537 (E.D. Pa. 1972), an action for declaration of unconstitutionality of a Pennsylvania criminal libel statute and an injunction against its enforcement were dismissed for lack of showing of irreparable injury, bad faith prosecution and harassment. The district court held that the state criminal prosecution, having commenced by the filing of a criminal complaint, was thereby pending at the time of the federal suit for declaratory and injunctive relief and thus the tests of *Younger* and *Samuels* had to be met. *Id.* at 536. In Byrne v. Karalexis, 401 U.S. 216 (1971), the Supreme Court held that indictments based upon challenged Massachusetts obscenity laws, although dismissed before a decision on the merits of plaintiff's federal action had been rendered, would be sufficient to invoke the *Younger* pending requirements. The Third Circuit rule is that dismissal of a suit for declaratory or injunctive relief will be proper under *Younger-Samuels* where the suit has been initiated after the filing of a state criminal complaint but before the grand jury has met. Lewis v. Kugler, 446 F.2d 1343, 1348 n.8 (3d Cir. 1971).

It has been proposed that the commencement of state criminal proceedings be determined at the date of first official action against an individual. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 309 (1971). If such a distinction is carried to its logical conclusion, a state prosecutor could permanently close the doors of federal court to potential plaintiffs against whom charges, however lacking in merit, were filed and even though they were later dropped.

A recent example of the confusion which surrounds the uncertainty of standards for the definition of "pending" is provided by Doran v. Salem Inn, Inc., 95 S. Ct. 2561 (1975). In *Doran*, the Court held that legally distinct plaintiffs joining together in the federal complaint were to be judged separately for determining whether any of their number were state criminal defendants and for applying the *Younger-Samuels* formulae. *See also* Allee v. Medrano, *supra* at 832–33 (Burger, C.J., concurring). In this connection, a prosecution will be deemed retroactively pending where any one of the federal plaintiffs after filing suit for anticipatory relief in federal court resumes the activity prohibited under the challenged statute and state prosecution is commenced against him. Justice Rehnquist, writing for the majority, stated:

> Having violated the ordinance, rather than awaiting the normal development of its federal lawsuit, [plaintiff] cannot now be heard to complain that its constitutional contentions are being resolved in a state court. Thus [plaintiff's] prayers for both injunctive and declaratory relief are subject to *Younger's* restrictions.

Doran v. Salem Inn, Inc., *supra* at 2567.

tests presently employed for each, and will discuss the impact of *Steffel* in the context of federal anticipatory relief. As will be shown, the decision leaves unanswered important questions regarding the nature of the declaratory judgment remedy and suggests that the Court is substituting a definitional test for a balancing test in the award of prospective relief.

I. PROSECUTION PENDING: INJUNCTION OR DECLARATORY JUDGMENT REQUESTED

From the nation's beginning, the federal government has chosen to rely upon state courts for the vindication of rights arising under the Constitution and federal laws and to avoid interference with state adjudication of those rights.[13] In *Ex Parte Young*,[14] the Supreme Court

13. In the first century of the country's history, the powers granted in art. III, § 2, cl. 1 of the Constitution were not fully utilized by the Congress and the federal courts; indeed, the eleventh amendment, prompted by reaction to federal interference in state activity in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793), restricted the power of federal courts by removing their jurisdiction in suits to which a state was a party. *See* Perez v. Ledesma, 401 U.S. 82, 105–07 (1971) (Brennan, J., concurring in part and dissenting in part).

The nationalistic impulse following the Civil War resulted in legislation expanding the authority of federal courts. The Judiciary Act of March 3, 1875, 28 U.S.C. § 1331 (1970), creating federal question jurisdiction, allowed federal district courts to hear all civil suits in which the matter in dispute exceeded a statutorily specified amount and which arose under the Constitution, treaties, or laws of the United States. As a result of the Act the district courts became "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States." Zwickler v. Koota, 389 U.S. 241, 247 (1967), *citing* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928). The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, 17 Stat. 13), invested lower federal courts with power to determine the constitutionality of conduct "under color of state law" which allegedly deprived individuals of federally protected rights. *See* note 2 *supra*. The Court in *Steffel* noted that "these two statutes, together with the Court's decision in *Ex parte Young*, 209 U.S. 123 (1908) . . . have 'established the modern framework for federal protection of constitutional rights from state interference.'" 415 U.S. at 464–65. Prior to the twentieth century, however, federal courts did not utilize these statutes to intervene in state prosecutions. They generally assumed that the eleventh amendment precluded such interference. *See, e.g.*, Hagood v. Southern, 117 U.S. 52 (1886). This sentiment was reinforced by the continued efficacy of the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), which was revised in 1878, 1911, and 1940. *See* notes 19 & 20 and accompanying text *infra*.

14. 209 U.S. 123 (1908). *Young* represented the first attempt to sort out the conflicting trends which emerged in the second half of the nineteenth century. In *Young*, a bill was sought to enjoin a company from complying with an act of the state legislature setting allowable rates to be charged by railroads operating within the state, the violation of which would result in either fine, imprisonment or both. The Court held the state statute invalid on its face. More importantly, the Court affirmed a citation for contempt against the state Attorney General who had sought enforcement

established a new precedent by staying state criminal proceedings and by enforcing an injunction against their continuance when the statutory basis for prosecution was under challenge. While *Young* provided an impetus for the evolution of federal intervention in state prosecutions, the general rule nonetheless remained that a federal court would not interfere with state criminal proceedings whether pending or threatened.[15] The Supreme Court, in *Douglas v. City of Jeannette*,[16] clearly articulated this doctrine. In *Douglas* Chief Justice Stone stated:[17]

> Congress . . . has adopted the policy . . . of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irrepar-

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of the statute despite the district court's injunction against enforcement pending the outcome of litigation on the constitutional question. "An injunction to prevent a [state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.* at 159. *Ex parte Young* did not actually violate the Anti-Injunction Act since the statute proscribed only injunctions preventing state officials from instituting future proceedings; it was silent regarding pending state action. *See* WRIGHT, *supra* note 7, at 206.

15. The storm of controversy following the *Young* decision indicated the sensitivity of states to potential federal inroads on their sovereignty. *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499 (1928); Hutcheson, *A Case for Three Judges,* 47 HARV. L. REV. 795 (1934). The congressional response was to require a three-judge panel in suits for interlocutory injunctions with direct review by the Supreme Court. Act of June 18, 1910, Pub. L. No. 218, § 17, 36 Stat. 557 (codified at 28 U.S.C. § 1342 (1970)). This action did not fully quell the uproar; indeed, the issue continued to be the subject of legislation for years. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967–79 (2d ed. 1973) [hereinafter cited as HART AND WECHSLER]. Despite Congressional attempts to curtail federal courts, the judiciary did not return to the pre-*Ex parte Young* attitude of total noninterference although restrictions on intervention were imposed. *See, e.g.,* Fenner v. Boykin, 271 U.S. 240 (1926). *See generally* Maraist, *Federal Intervention in State Criminal Proceedings:* Dombrowski, Younger, *and Beyond,* 50 TEXAS L. REV. 1324, 1325–32 (1972) [hereinafter cited as Maraist]; Warren, *Federal and State Court Interference,* 43 HARV. L. REV. 345, 359–78 (1930).

16. 319 U.S. 157 (1943). In *Douglas,* a group of Jehovah's Witnesses had sought injunctive relief against a threatened prosecution in a state court for violations of a city ordinance which prohibited solicitation of orders for merchandise without a license issued by the municipality. Despite a determination that the challenged ordinance was unconstitutional in a companion case, Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court held that equitable relief was inappropriate absent demonstration of imminent and irreparable injury beyond that incident to every good-faith criminal prosecution.

17. 319 U.S. at 163.

> able injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds.

Thus, *Douglas* required that a plaintiff show special circumstances beyond those traditionally necessary in equity, *i.e.*, a "grave and immediate" threat to the existence of a constitutionally protected activity before a federal court could render prospective relief. The nature of such special circumstances where the state prosecution is pending can best be analyzed by examining the type of relief sought.

A. Injunctive Relief

Three distinct requirements must be met by a plaintiff seeking an injunction against *pending* state prosecution in federal court. First, he must meet the traditional equitable standards of imminent irreparable injury and the absence of an adequate remedy at law.[18] Second, the action he brings must qualify as one of the exceptions permitted by the federal Anti-Injunction Act,[19] which limits the issuance of a federal injunction to restrain pending state proceedings to three situations: (1) where expressly authorized by Act of Congress;[20] (2) where necessary in aid of the court's jurisdiction; or (3) where required to protect or effectuate the court's judgment. Finally, in *Younger v. Harris*[21] the Supreme Court erected the last and most substantial hurdle facing a federal plaintiff seeking an injunction against a pending state prosecution.

In *Younger,* the Court held that the federal plaintiff must not only meet the requirements of the Anti-Injunction Act and of traditional equitable jurisprudence, but must also demonstrate prosecutorial bad

18. *See* note 8 *supra. See also* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEXAS L. REV. 535, 547 (1970).

19. 28 U.S.C. § 2283 (1970). *See* note 8 *supra.*

20. In Mitchum v. Foster, 407 U.S. 225 (1972), the Court held that in suits brought to enforce the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), injunctions to stay state court proceedings are "expressly authorized by Act of Congress" within the meaning of the Anti-Injunction Act. But, the Court noted that "we do not question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id.* at 243. Steffel brought his action under the Civil Rights Act. *See* note 2 and accompanying text *supra.*

21. 401 U.S. 37 (1971).

faith, harassment, or some other similarly exceptional circumstances.[22] Thus, a federal court may not enjoin the good faith prosecution of a state criminal statute even if it appears unconstitutional on its face.[23] The Court reasoned that although federal courts may be anxious to vindicate constitutional rights, the principle of federalism precludes interference with state court proceedings lawfully instituted absent such extraordinary circumstances. In reaching this conclusion, the Court halted the trend of lower federal courts to expansively interpret *Dombrowski v. Pfister,*[24] and for the first time suggested that the status of the state prosecution affects the appropriateness of federal anticipatory relief.[25]

B. Declaratory Judgment

In order to provide a more viable remedy than injunctive relief for testing the constitutionality of state statutes, Congress enacted the

22. *Id.* at 54. The Court did not mention what other "unusual circumstances" might be. *Id. See* Note, *I Used to Love You But It's All Over Now: Abstention and the Federal Courts Retreat from their Role as Primary Guardians of First Amendment Freedoms,* 45 S. CAL. L. REV. 847 (1972). *See also* Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending,* 72 COLUM. L. REV. 874 (1972); Note, *Federal Relief Against Threatened State Prosecutions: The Implications of* Younger, Lake Carriers *and* Roe, 48 N.Y.U.L. REV. 965 (1973).

23. 401 U.S. at 53–54.

24. 380 U.S. 479 (1965). *See* notes 32–36 and accompanying text *infra. See also* Sedler, *Dombrowski in the Wake of Younger: The View From Without and Within,* 1972 WIS. L. REV. 1.

25. The *Younger* analysis presupposes that the pendency of state criminal action will be crucial in a decision to permit or to abstain from affording federal anticipatory relief. The Court stated: "We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter." 401 U.S. at 42. Under such circumstances, the "chilling" factors that prompted the granting of federal relief in *Dombrowski* are presumably less compelling. The Court stated: "[T]his sort of 'chilling effect,' as the Court called it, should not by itself justify federal intervention. . . . Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* at 50–51. *Accord,* Cameron v. Johnson, 390 U.S. 611 (1968) (injunction against enforcement of anti-picketing statute challenged as a vague and overbroad denied where prosecution pending and record did not establish the necessary bad faith and harassment).

This rule is justified for two reasons: First, it may be costly to abate state proceedings and then place the burden upon the state to *re*-prosecute if it prevailed on the federal issues; second, the possible sources of injury to fundamental constitutional rights may be less easily identifiable or correctable prior to state initiation of the criminal process.

Declaratory Judgment Act in 1934.[26] By means of this statutory remedy, Congress contemplated a vehicle by which a citizen could obtain an authoritative pronouncement of his federal rights without sustaining the costs of criminal prosecution, and without the intrusive effects of an injunction against state court action.[27]

Despite these salutary purposes, the Supreme Court in *Samuels v. Mackell*[28] superimposed the requirements of *Younger* on the federal plaintiff seeking a declaratory judgment as to the constitutionality of a state statute under which he was being prosecuted. In *Samuels,* the Court stated:[29]

> [I]n cases where the criminal proceeding [is] begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. . . . [D]eeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.

Thus, when seeking declaratory relief against a pending state criminal proceeding, the plaintiff must allege facts which show bad faith, harassment, or other extraordinary circumstances.

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26. The Act is codified in 28 U.S.C. §§ 2201–02 (1970). Section 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202 also provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." *See generally* S. EAGER, THE DECLARATORY JUDGMENT ACTION (1971).

27. *See* S. REP. No. 1005, 73d Cong., 2d Sess. 2–3, 6 (1934). The House Committee Report stated: "The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." H.R. REP. No. 1264, 73d Cong., 2d Sess. 2 (1934), *quoted in* Perez v. Ledesma, 401 U.S. 82, 111–12 (Brennan, J., concurring in part and dissenting in part). Summarizing, Justice Brennan stated: "The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy." *Id.* at 111.

28. 401 U.S. 66 (1971). In *Samuels* the plaintiffs were indicted under a New York statute on charges of criminal anarchy and sought federal relief in the form of an injunction, or, alternatively, declaratory judgment on grounds that the statute was void for vagueness and violative of first and fourteenth amendment rights.

29. *Id.* at 72.

II. PROSECUTION THREATENED: INJUNCTION REQUESTED

As suggested above,[30] the distinction between pending and threatened state prosecution is a relatively recent development in the law of federal anticipatory relief. Following *Ex parte Young,* federal courts prohibited intervention against *threatened* prosecutions just as they had prohibited intervention against *pending* prosecutions, *i.e.,* absent a showing of special circumstances federal intervention was impermissable.[31]

In *Dombrowski v. Pfister,*[32] the Supreme Court attempted to give substance to the "special circumstances" test where state prosecution had not been commenced. The *Dombrowski* Court held that an injunction would be appropriate (1) where a statute was facially unconstitutional because of vagueness or overbreadth, or (2) where a statute, although valid on its face, was being enforced in bad faith.[33] The Court's reasoning thus closely adhered to the irreparable injury test for traditional equitable relief. In essence, the Court held that a federal plaintiff demonstrating either bad faith harassment of a constitutionally protected activity, or threatened prosecution under a facially unconstitutional state statute, suffered sufficient irreparable injury to warrant federal relief.[34] The Court also held that before a statute

30. *See* text accompanying note 25 *supra.*

31. *See, e.g.,* Douglas v. City of Jeannette, 319 U.S. 157 (1943); Watson v. Buck, 313 U.S. 387 (1941).

32. 380 U.S. 479 (1965). In *Dombrowski,* plaintiffs claimed that Louisiana officials unlawfully threatened to enforce the state's Communist control statute against their organization, the Southern Conference Educational Fund, Inc. The complaint alleged that the statute was unconstitutional on its face and that the threat of prosecution constituted part of a plan to harass the plaintiffs' organization and to discourage their efforts in the civil rights area.

In addition to seeking injunctive relief, the *Dombrowski* plaintiffs also sought a declaratory judgment. While the Court found the Louisiana statute void on its face, it did not suggest whether a different set of tests was to be applied in the event that only a declaratory judgment was requested. Rather, the Court blended the discussion of relief into a generalized analysis of the applicability of the abstention doctrine in the factual situation presented. *See generally* Brewer, Dombrowski v. Pfister: *Federal Injunction Against State Prosecution in Civil Rights Cases—A New Trend in Federal-State Relations,* 34 FORDHAM L. REV. 71 (1965).

33. 380 U.S. at 490–92.

34. The Court reasoned that the exercise of first amendment rights would be chilled in "a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." *Id.* at 485. In such a situation the Court held that there was sufficient irreparable injury to justify equitable intervention by means of an injunction:

[A]bstention serves no legitimate purpose where a statute regulating speech is

could be found unconstitutional on its face it must appear unlikely that it was susceptible of a limiting construction by a state tribunal.

The Court in *Dombrowski* did not presume, as it did subsequently in *Younger*,[35] that the state court *must* be allowed an opportunity to interpret the challenged statute. Nor did *Dombrowski* require a showing of the improbability of a saving construction of the statute before a federal court would entertain jurisdiction of a dispute under it.[36] These factors suggest that the Court did not contemplate a broad scale use of abstention in injunction proceedings where a statute is attacked either on its face or as applied, its application is in bad faith, and no state prosecution is extant.

Although the holding of *Dombrowski* applied only to cases of threatened prosecution, the Court's broad language suggested that the status of the state prosecution should not be determinative of the federal plaintiff's right to intervene. Consequently, federal courts expanded *Dombrowski* to encompass pending prosecutions.[37] As indicated above,[38] the Court's subsequent response in *Younger* halted this trend and imposed additional requirements where the state had commenced its criminal process.

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properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as a result of a single criminal prosecution and is not the sort of "hard-core" conduct that would obviously be prohibited under any construction.

Id. at 491–92.

35. *See* text accompanying notes 21–22 *supra.*

36. Lower federal court decisions have received mixed responses from the Supreme Court where the propriety of staying federal action prefatory to construction of a state statute by a state court is at issue. *Compare* Reetz v. Bozanich, 397 U.S. 82 (1970) (three-judge district court ordered to abstain from ruling on the merits of an Alaskan fishing regulation) *and* Askew v. Hargrave, 401 U.S. 476 (1971) (case remanded to await consideration of state constitutional claims by a state tribunal prior to a hearing on the merits of an equal protection challenge to a Florida statute) *with* Wisconsin v. Constantineau, 400 U.S. 433 (1971) (upholding a three-judge district court decision which invalidated the continued enforcement of a previously uninterpreted Wisconsin statute providing for posting of the name of any person "who by [reason of] excessive drinking" exhibited certain traits). In *Constantineau*, the Court found that the absence of provisions for notice or opportunity to be heard prior to the posting represented an unambiguous denial of due process and therefore required no prior construction by state courts.

37. *See, e.g.*, Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969), *rev'd sub nom.* Dyson v. Stein, 401 U.S. 200 (1971); Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969) (injunction granted to prevent the harassment or prosecution of a group of "hippies" under the state vagrancy statute); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968) (injunction granted releasing purportedly obscene film and staying state prosecution of theatre owner). *See generally* Maraist, *supra* note 18, at 591–603.

38. *See* notes 21–22 and accompanying text *supra.*

The effect of the *Younger* constriction on the *Dombrowski* holding vis-à-vis threatened prosecutions remains uncertain. The Court's most recent statement in this area, *Allee v. Medrano*,[39] recited the *Dombrowski* tests but failed to reach a precise holding. Because the record did not indicate whether the plaintiffs were currently being prosecuted under one or all of the challenged statutes, the Court remanded.[40] *Allee* is significant, however, because of the concurring opinion of Chief Justice Burger[41] in which he voiced support for the requirement of showing substantial risk of future bad faith prosecution[42] as a prerequisite to an injunction against anticipated conduct of state officials. In essence, Chief Justice Burger and the two justices joining in his opinion assumed that the *Younger* tests should apply in instances of threatened enforcements of allegedly unconstitutional statutes where the relief sought is injunctive.[43]

39. 416 U.S. 802 (1974). *Allee* involved the alleged intimidation and harassment of union organizers for the United Farm Workers by law enforcement officials acting under color of several state statutes. A class action was brought by the United Farm Workers Organizing Committee and certain named individuals under 42 U.S.C. §§ 1983, 1985 (1970), charging that various Texas Rangers and other county law enforcement officers had violated the plaintiffs' first amendment rights of free speech and assembly through unlawful arrests and physical abuse. The complaint sought injunctive and declaratory relief to prevent the enforcement of the statutory bases for official action, *i.e.*, five Texas statutes prohibiting mass picketing; secondary picketing, strikes and boycotts; unlawful assembly; breach of the peace; and, abusive language. A three-judge district court granted both forms of requested relief.

40. *Id.* at 820–21. The Court stated in summary:

> [A]lthough there was a live controversy as to these statutes at the time of the District Court decree, if there are no pending prosecutions under the old statutes, the portions of the District Court's judgment relating to them has become moot. But because we cannot determine with certainty whether there are pending prosecutions, or even whether the District Court intended to enjoin them if there were, the proper disposition is to remand the case to the District Court for further findings.

Id. at 818 (footnote omitted).

41. *Id.* at 821 (Burger, C. J., concurring in part and dissenting in part).

42. The Chief Justice construed "bad faith" to encompass threats by the prosecuting attorney and not merely the remarks of a police officer. *Id.* at 837.

43. Chief Justice Burger was joined by Justices White and Rehnquist. In concluding, he indicated that federal intervention would be appropriate only in the following circumstances:

> [A] state court cannot effectively fulfill its responsibility when the prosecutorial authorities take deliberate action, in bad faith, unfairly to deprive a person of a reasonable and adequate opportunity to make application in the state courts for vindication of his constitutional rights. When such an individual, deprived of meaningful access to the state courts, faces irreparable injury to constitutional rights of great and immediate magnitude, either in the immediate suit or in the substantial likelihood of "repeated prosecutions to which he will be subjected" . . . and the injury demands prompt relief, federal courts are not prevented by considerations of comity from granting the extraordinary remedy of interference in pending state criminal prosecutions.

Id. at 835 (Burger, C.J., concurring in part and dissenting in part) (citation omitted).

III. PROSECUTION THREATENED: DECLARATORY JUDGMENT REQUESTED

A. The Steffel *Case*

Steffel v. Thompson presented the Supreme Court with the issue reserved in *Samuels v. Mackell*;[44] that is, the applicability of *Younger* to the granting of declaratory relief when no state prosecution is pending but when a threat of prosecution legitimately exists. In examining this question, the district court had read *Younger* and *Samuels* as requiring the denial of relief.[45] The Supreme Court rejected the district court's analysis, holding that where no state criminal proceeding is pending at the time the federal suit is filed, the principles militating in favor of abstention are not compelling.[46] The Court reasoned that intervention under such circumstances would not result in duplication or disruption of state proceedings; neither could it then be interpreted as a denial of state competence to decide constitutional issues raised by its own statutes.[47]

Most significantly, the Court held that when no state criminal proceeding is pending at the time of the federal action, the appropriateness of a declaratory judgment is to be considered independently from the question of the availability of an injunction.[48] Writing for the majority, Justice Brennan relied heavily on his separate opinion in *Perez v. Ledesma*.[49] Focusing on the legislative history of the Declara-

44. 401 U.S. 66 (1971). *See* text accompanying notes 28–29 *supra*.

45. Becker v. Thompson, 334 F. Supp. 1386 (N.D. Ga. 1971). The district court held that a federal court cannot hypothesize as to the potential consequences of future arrests for a present plaintiff, and therefore, ought not to intervene prospectively absent a showing of either bad-faith enforcement or harassment, or both. This bad-faith test was presumed to apply equally to injunctions and declaratory judgments. *Id.* at 1389.

46. 415 U.S. at 462.

47. *Id.*

48. The Court stated: "When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief." *Id.*

49. 401 U.S. 82, 93 (1971). *Perez* is one of a group of six cases which were decided on the same day as Younger v. Harris, 401 U.S. 37 (1971), and which came to be known as the *Younger* or February Sextet. Appellees in *Perez* had been arrested and charged with violation of a Louisiana statute and a local ordinance prohibiting the display of obscene materials. After the state court proceedings had been initiated by the filing of informations, appellees filed suit in federal district court for a declaration that the statute and ordinance were unconstitutional and for an injunction against their enforcement. The three-judge district court refused to grant injunctive relief and upheld the constitutionality of the challenged laws, but found

tory Judgment Act, he maintained that Congress intended a declaratory judgment—prospective relief which is less disruptive of a state's affairs than an injunction—to be an alternative to injunction.[50] Under his analysis, a declaratory judgment is persuasive whereas an injunction is coercive. Noncompliance with a declaratory judgment, however inappropriate, would not, unlike noncompliance with an injunction, constitute contempt.[51] Thus, under *Steffel,* where a federal plaintiff can demonstrate a genuine threat of prosecution under an allegedly unconstitutional state statute, he can obtain a declaration of his rights in federal court.

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that the arrests and seizure of materials were invalid. It issued a suppression order prohibiting the use of the illegally obtained material in the state proceedings. A single-judge district court subsequently held the ordinances invalid. On appeal the Supreme Court held that the issuance of the suppression order effectively curtailing the then-pending good-faith state criminal prosecution was in the nature of an injunction and therefore inappropriate. The Court remanded to the district court for a redetermination of the declaration of constitutionality. *Id.* at 88.

Justice Brennan concurred in the decision regarding the impropriety of injunctive relief in these circumstances, but dissented to the remand on the ground that the declaratory judgment was within the discretion of the district court. His opinion set forth in detail the perspective adopted by the majority of the Court in *Steffel* with respect to the nature of declaratory relief and its effects. *See* notes 9 & 27 *supra.*

50. *But cf.* the majority opinion of Justice Black in Samuels v. Mackell, 401 U.S. 66 (1971). In ruling that neither injunctive nor declaratory relief was appropriate in the face of pending state criminal prosecution, the Court noted that the practical effects of both an injunction and a declaratory judgment were identical. *Id.* at 71–72. However, the Court observed:

> There may be *unusual circumstances* in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief.

Id. at 73 (emphasis added). *See also* Cameron v. Johnson, 390 U.S. 611 (1968), where the Court affirmed the denial of a declaratory judgment that an anti-picketing statute was valid on its face in circumstances in which an injunction would not lie.

Persuasive reasons exist for confining the *Younger* restrictions to requests for injunction only. First, the legislative history of the Declaratory Judgment Act clearly indicates that the declarative remedy was designed to be made available to federal plaintiffs regardless of the availability of injunctive relief. *See* notes 9 & 27 *supra.* Justice Black's equation of declaratory and injunctive relief negates the utility of the declarative remedy when a state prosecution is pending. In addition, this equation fails to recognize that considerations of federalism do not militate as strongly for abstention when a declaratory judgment is requested. Under Justice Brennan's analysis, Congress did not intend it to be as substantial an interference with state proceedings as an injunction. Finally, the absence of an "anti-declaratory judgment" statute indicates that a negative mandate does not exist as in the case of the Anti-Injunction Act. This reinforces the conclusion that Congress did not intend that declaratory relief should be summarily denied because an injunction is inappropriate. Thus, the recognition in *Steffel* that differing considerations are to be applied in assessing the availability of each type of anticipatory relief may require a re-examination of the *Samuels* holding.

51. 415 U.S. at 471, *citing* Perez v. Ledesma, 401 U.S. 82, 124–26 (1971) (Brennan, J., concurring in part and dissenting in part).

While the Court unanimously agreed that the tests for a declaratory judgment and those for an injunction should be severed in the context of threatened state criminal action, the impact of *Steffel* is by no means certain. Four justices participated in three concurring opinions which reflect substantial disagreement as to the extent of the holding and the consequences of a declaratory judgment remedy.

B. *The* Steffel *Legacy—Unanswered Questions of Federal Anticipatory Relief*

1. *The problems of article III*

The *Steffel* Court clearly indicated that where a state prosecution is not pending a federal plaintiff seeking a declaratory judgment need not demonstrate irreparable injury—a requirement when seeking injunctive relief.[52] The extent to which this holding expands the availability of the declaratory judgment remedy, however, may depend on the attitude of the Court in examining the requirements of article III of the Constitution.[53] When state prosecution has been commenced,

52. The Court stated:

> [E]ngrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.

415 U.S. at 471. Justice Brennan also quoted Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972), to the effect that superimposing equitable prerequisites on the declaratory judgment remedy would amount to *pro tanto* repeal of the Declaratory Judgment Act. *Id.* at 832.

53. The constitutional power of the federal judiciary presupposes the existence of a case or controversy under article III. This requirement is also statutorily imposed in actions for declaratory judgments. *See* note 26 *supra*. Defining the prerequisites of a constitutionally sufficient case or controversy, however, has been an elusive task. As Chief Justice Warren appropriately noted, the language of case or controversy is the simplistic tip of an exceptionally complex iceberg. *See* Flast v. Cohen, 392 U.S. 83, 94 (1968). Essentially two notions are intertwined. First, the party seeking a federal forum must have a personal interest in the controversy's outcome and be sufficiently adverse in his interest to be an appropriate advocate of the claim. This is the problem of standing. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216–28 (1974) (interest shared by public at large necessarily implies an injury too abstract on which to base standing of citizens' associations to challenge armed forces reserve membership of members of Congress); Flast v. Cohen, *supra* at 99–100 (sufficient taxpayer interest found to confer standing based upon alleged abuse of congressional power under the taxing and spending clause); Baker v. Carr, 369 U.S. 186, 204 (1962) (debasement of voting power as alleged denial of equal protection is a sufficient personal stake in the outcome of litigation for standing to seek reapportionment of legislative districts). *See generally* HART & WECHSLER, *supra* note 15, at 151–83; WRIGHT, *supra* note 7, at 39–45. The second notion

the defendant is clearly confronted with a concrete dispute. Thus, it is not surprising that the Court summarily disposed of the justiciability issue in *Younger*[54] and passed upon it *sub silentio* in *Samuels*.[55] On the other hand, in the absence of such proceedings, the requirement of an actual controversy becomes more problematic. The more removed from the criminal process a federal plaintiff becomes, the less concrete the controversy. In *Steffel,* the Court indicated that the threat of arrest was both real and immediate when the federal action was filed, and therefore the circumstances fulfilled the constitutional requirements.[56] As Justice Stewart noted in his concurring opinion, however, the

involves an inquiry into the nature of the dispute, *i.e.,* its justiciability. Because of the historic aversion to advisory opinions, the Court has traditionally required a substantial controversy which is appropriate for judicial resolution. *See, e.g.,* Laird v. Tatum, 408 U.S. 1 (1972) (class action seeking declaratory and injunctive relief against army surveillance of civilian political activity not justiciable); Poe v. Ullman, 367 U.S. 497 (1961) (state practice of not prosecuting under anti-contraception statute made challenge nonjusticiable); United Public Workers v. Mitchell, 330 U.S. 75 (1947) (proposed conduct by federal employees in violation of the Hatch Act did not present a suitable controversy for adjudication). The Court has indicated in the anticipatory relief context that article III requires the allegation of actual or threatened, and not merely conjectural or hypothetical, injury. *See, e.g.,* O'Shea v. Littleton, 414 U.S. 488, (1974) (denial of injunction against allegedly illegal bail and jury fee setting affirmed where plaintiffs had shown neither past injury nor any likelihood of prospective injury); Golden v. Zwickler, 394 U.S. 103, 108–10 (1969) (action for declaratory judgment to invalidate statute prohibiting anonymous campaign literature not maintainable where election had been held and the candidate who was the subject of the literature was unlikely to run for election in the future). *See generally* WRIGHT, *supra* note 7, at 39–45. It has been noted that the Court's treatment of the standing and justiciability questions in the context of federal anticipatory relief has overlapped. *See* Comment, *Federal Declaratory Relief from Unconstitutional State Statutes: The Implications of* Steffel v. Thompson, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 520, 527 n.44 (1974).

54. The original federal plaintiff in *Younger* had been indicted in state court before he brought the federal action. The Court concluded: "He thus has an acute, live controversy with the State and its prosecutor." 401 U.S. at 41. Three other intervenors who were not indicted but who alleged inhibition of their first amendment rights because of Harris' prosecution were dismissed from the suit because the Court found that they lacked standing. *Id.* at 42.

55. In *Samuels,* unlike *Younger,* all the federal plaintiffs were indicted in state court before the federal claim was filed. The Court initially indicated that indictments existed and did not discuss article III problems thereafter.

56. The Court stated:

> Unlike three of the appellees in *Younger v. Harris* . . . petitioner has alleged threats of prosecution that cannot be characterized as "imaginary or speculative . . . ." He has been twice warned to stop handbilling . . . and has been told by the police if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been "chimerical . . . ."

415 U.S. at 459 (citations omitted). This statement applied only to the time of the action's commencement. The issue of its applicability through all stages of the litigation was the subject of the Court's remand. *Id. See* notes 59 & 60 and accompanying text *infra.*

number of cases in which such a genuine threat of enforcement exists may be slight.[57]

Justice Stewart's prognosis may be correct. Future Richard Steffels confront a substantial dilemma. Although the Declaratory Judgment Act was intended to apprise federal plaintiffs of the constitionality of *prospective* conduct, article III requires sufficient *past* conduct to create a justiciable controversy. If putative federal plaintiffs engage in too much activity they may find themselves prosecuted by the state; if they engage in too little, sufficient threat of prosecution may not exist to create a viable case or controversy under article III. The result may be the deterrence of constitutionally protected activity unless a flexible view of the case and controversy requirement is taken.[58]

Another factor exacerbates this dilemma. The Court in *Steffel* remanded the case to the district court to determine whether subsequent events in Southeast Asia had altered the plaintiff's desire to handbill.[59] If the plaintiff had lost interest, a justiciable controversy would no longer exist. Thus, the Court made its view clear that the justiciability

57. 415 U.S. at 476 (Stewart, J., concurring).

58. A rigid construction of article III requirements will place a putative federal plaintiff in precisely the dilemma which proponents of the Declaratory Judgment Act sought to avoid. In testifying before the Senate Judiciary Committee on behalf of declaratory judgment legislation, Professor Borchard indicated that the choice between foregoing constitutionally protected rights and facing criminal prosecution for violation of an unconstitutional state statute was untenable under a "civilized legal system." He found that "[t]he court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toad stool, is to eat it." *Hearings on H.R. 5623 Before the Subcomm. of the Senate Comm. on the Judiciary,* 70th Cong., 1st Sess. 75–76 (1928), *quoted in* Steffel v. Thompson, 415 U.S. at 468 n.18.

Although in some circumstances the Court has taken a flexible approach to article III problems, the elements necessary to demonstrate a genuine threat of prosecution remain unclear. The abortion cases represent the least restrictive interpretation. In those cases, the Court required only a likelihood of prosecution arising from existing circumstances or reasonably likely acts. *See* Roe v. Wade, 413 U.S. 113, 127–29 (1973); Doe v. Bolton, 410 U.S. 179 (1973). A similarly flexible attitude has been reflected in other contexts. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97 (1968) (state statute proscribing teaching of the theory of evolution found unconstitutional despite no pending prosecution and state's assurances that it would no longer enforce the statute). *But cf.* Poe v. Ullman, 367 U.S. 497 (1961) (challenge to unenforced birth control statute not justiciable). However, in other circumstances the Court has been less willing to expand justiciability requirements. *See, e.g.,* Younger v. Harris, 401 U.S. 37 (1971); Boyle v. Landry, 401 U.S. 77 (1971) (injunction denied to a group of black Chicago citizens on the ground that complaint, while claiming harassment under certain statutes, failed to allege requisite irreparable harm where none of the plaintiffs had been arrested, charged, prosecuted or threatened with prosecution); Preiser v. Newkirk, 95 S. Ct. 2330 (1975) (plaintiff's return to medium security prison and lack of potential for recurrence of harm rendered petition for declaratory and injunctive relief challenging the original transfer procedure moot).

59. 415 U.S. at 460.

requirement must continue at all stages of the federal proceedings.[60] This conclusion has been subsequently relied upon by the Court in remanding another declaratory judgment action on similar grounds. In *Ellis v. Dyson*[61] the Court refused to examine the merits of a constitutional attack on a Dallas, Texas, loitering ordinance because the record suggested that the federal plaintiffs were no longer subject to a grave threat of prosecution. Given the protracted process of judicial review, the continuing controversy requirement may effectively foreclose a putative plaintiff from vindicating his constitutional rights in a federal forum.

2. *Superseding state action*

In addition to article III problems, another factor reinforces Justice Stewart's prognosis in *Steffel*. Under *Steffel* and its progeny, the federal plaintiff must also contend with state action commenced *after* the declaratory judgment complaint is filed. While this obstacle clearly exists, its magnitude remains unclear. The Court in *Samuels v. Mackell* did not indicate what effect a federal court should give to a state action commenced after a federal complaint is filed.[62] The decision's underlying rationale, however, could be read to suggest that the federal court should invariably dismiss the action; continued litigation coincidental with state proceedings would represent an intrusion under principles of federalism and comity whether the state action began before or after the federal one.[63] This is precisely the conclu-

60. The Court indicated that "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* at 459 n.10. *See also* Golden v. Zwickler, 394 U.S. 103, 108 (1969).

61. 421 U.S. 426 (1975). In *Ellis*, the state defendants (plaintiffs in the subsequent federal action) were arrested in January, 1972, and tried in Municipal Court the following month under the challenged ordinance. They were found guilty and fined $10 each. *Id.* at 428. After the 10-day period for review in the state court system had expired, they filed a federal action under civil rights statutes and the Declaratory Judgment Act. The federal district court dismissed the case in December, 1972. 358 F. Supp. 262 (N.D. Tex. 1972). The Court of Appeals for the Fifth Circuit affirmed without an opinion in April, 1973. 475 F.2d 1402 (5th Cir. 1973). Certiorari was granted in April, 1974, following *Steffel*. The Supreme Court's reversal of the district court's dismissal and remand of the case occurred in May, 1975. During argument, counsel for appellant admitted that they had not seen their clients for months and did not know their whereabouts. 421 U.S. at 434.

62. The Court explicitly limited its holding to situations where the state action had been commenced prior to the federal complaint. *See* text accompanying note 29 *supra*.

63. This conclusion illustrates the problem with articulating a "bright line" test purportedly based upon a balancing of competing factors. *See* Part IV *infra*.

sion reached by Justice Rehnquist in his concurrence in *Steffel*.[64] Language in the majority opinion in *Steffel*, however, suggested that the time of filing should determine the viability of the federal remedy. The Court stated:[65]

> When no state criminal proceeding is *pending at the time the federal complaint is filed,* federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Presumably, then, the state prosecutor cannot foreclose the federal forum once a declaratory judgment complaint is filed.

The Court has subsequently indicated that the time of filing is not determinative and that the state possesses the power to preempt the federal plaintiff. In the recent case of *Hicks v. Miranda*,[66] the Court applied the *Younger-Samuels* test to federal plaintiffs who had not been subjected to state criminal proceedings until after commencement of the federal action. The Court held that state action could supersede a federal claim if it is filed "before any proceedings of substance on the merits have taken place in the federal action . . . ."[67] Thus, under *Hicks* the state can preclude resort to a federal forum by commencing proceedings after the federal claim is filed. While this avoids the problem of a race to the courthouse, it imbues the state prosecutor with power to manipulate principles of federalism and

64. Justice Rehnquist concluded: "For any arrest prior to the resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*." 415 U.S. at 480 (Rehnquist, J., concurring).

65. 415 U.S. at 462 (emphasis added). This conclusion reflected Justice Brennan's view previously articulated in Perez v. Ledesma, 401 U.S. at 104 (Brennan, J., concurring in part and dissenting in part).

66. 95 S. Ct. 2281 (1975). In *Hicks*, the federal plaintiffs had been joined in an existing state prosecution one day after service of process for the declaratory judgment and injunction had been made. The controversy stemmed from police seizure of the film "Deep Throat" and the subsequent misdemeanor charges which were filed against employees of the Pussycat Theatre where the film had been showing. The plaintiffs in federal court were the owner of the theatre and the corporation in whose name he was doing business.

67. *Id.* at 2292. In reviewing existing precedent the Court stated: "Neither Steffel v. Thompson . . . nor any other case in this Court has held that for Younger v. Harris to apply, the state-criminal proceedings must be pending on the day the federal case is filed. Indeed, the issue has been left open . . . ." *Id. But see* text accompanying note 65 *supra*. Justice Stewart, in dissent, strongly disagreed with the Court's holding. He concluded that the ruling in *Hicks* "trivializes" the *Steffel* holding. *Id.* at 2294. (Stewart, J., dissenting).

comity to operate exclusively in his favor.[68] Consequently, the reciprocity inherent in the concepts of comity and federalism is violated.

3. *The effects of a declaratory judgment*

The viability of a declaratory judgment for future plaintiffs will also depend on the judicial effect of the remedy. While Justice Brennan's majority opinion left this issue open,[69] the concurring opinions of Justices White and Rehnquist reflect differing attitudes of the Court regarding the res judicata effect of a declaratory judgment. These differences are significant in two contexts: First, when a state tribunal is confronted with a declaratory judgment and asked to give it some effect; and second, when a federal court is asked to issue an injunction based on the result of a declaratory judgment proceeding.

In attempting to clarify the tortuous path of the Court in the area of anticipatory relief, Justice Rehnquist stated:[70]

> A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties.

Thus, any effect of a declaratory judgment is only by way of stare decisis and not res judicata according to Justice Rehnquist's approach, and such a remedy will neither support a subsequent injunction issued by a federal court nor dismissal of a suit in state court.[71]

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68. Justice Stewart made this point in dissent:

> The Court's new rule creates a reality which few state prosecutors can be expected to ignore. It is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction. . . . Today's opinion virtually instructs state officials to answer federal complaints with state indictments. . . .
>
> The doctrine of Younger v. Harris reflects an accommodation of competing interests. The rule announced today distorts that balance beyond recognition.

Id. at 2296 (Stewart, J., dissenting).

69. Justice Brennan, quoting extensively from his opinion in *Perez,* carefully avoided articulating specific effects to be given a declaratory judgment. Thus he stated: "[T]he declaration does not necessarily bar prosecutions under the [challenged] statute, as a broad injunction would." 415 U.S. at 470. He concluded, however: "[T]he federal court judgment may have some *res judicata* effect, though this point is not free from difficulty . . . ." *Id.*

70. *Id.* at 482 (Rehnquist, J., concurring).

71. *Id.* Justice Rehnquist distinguished between the effects to be given in a federal court and in a state court, however:

> [T]he federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal

Justice White, also concurring in *Steffel,* responded to Justice Rehnquist's opinion, and argued that a declaratory judgment should be afforded the same res judicata effects as any final judgment on the merits of the controversy.[72] Thus, a federal plaintiff could obtain immunity from prosecution under a state law which had been declared unconstitutional. While Justice White did not explicitly conclude that an injunction could be subsequently issued based on the declaratory judgment, he strongly intimated that the Act itself and prior judicial interpretations of it would support such a conclusion.[73]

The Declaratory Judgment Act coupled with the potentially deleterious implications of Justice Rehnquist's approach militate for adoption of Justice White's analysis. First, the plain language of the Act provides: "any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."[74] This language clearly suggests, and has been interpreted to mean, that a declaratory judgment does have res judicata effects.[75] Second, the consequence of Justice Rehnquist's approach would be to make a declaratory judgment an advisory opinion, a result precluded from the scope

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jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive. *Id.* at 482 n.3.

72. *Id.* at 477 (White, J., concurring).

73. *Id.*

74. 28 U.S.C. § 2201 (1970). *See* note 26 and accompanying text *supra.* Professor Borchard, an early proponent of the Act, explained the intended effect as follows:

> Its declaratory, determinative, and adjudicatory function is its distinctive characteristic. . . . [I]t is the fact that it constitutes an official, final, binding, and unchallengeable declaration of the rights of the parties constituting *res judicata,* which gives it its character in the judicial process.

E. BORCHARD, DECLARATORY JUDGMENTS 10-11 (2d ed. 1941). *See also* Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts,* 46 S. CAL. L. REV. 803 (1973).

75. *See, e.g.,* Samuels v. Mackell, 401 U.S. 66, 72 (1970), where Justice Black stated that if a state prosecution is initiated subsequent to a federal declaration that the statute which serves as the basis for the state proceedings is unconstitutional, a federal plaintiff could seek and be entitled to an injunction under 28 U.S.C. § 2202 (1970). Justice Douglas, in his dissenting opinion in Mitchell v. Donovan, 398 U.S. 427, 432 (1970), treated injunctive and declaratory relief as having equal and final force. Under his analysis, the Court in *Mitchell* would have been required to extend the direct review provisions of 28 U.S.C. § 1343 (1970) to a denial of a declaratory judgment by a three-judge district court, as well as to a denial of an injunction. As the Court stated in Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952):

> Is the declaration contemplated here to be *res judicata,* so that the [state court] cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State [court] before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

Id. at 247.

of federal judicial power by article III of the Constitution.[76] Finally, Justice Rehnquist's analysis would also be dysfunctional to a meaningful concept of federalism. The state's power to disregard the federal court's opinion would mean that considerations of comity and federalism would run only in one direction, *i.e.,* federal courts would defer to state courts, but not vice versa.[77]

IV. CONCLUSION

The Supreme Court's recent decisions concerning anticipatory relief from prosecution under an allegedly unconstitutional state statute confront a prospective plaintiff with a maze of differing prerequisites which must be met to vindicate his constitutional claim in a federal forum. The Court has continued to articulate the need to balance the plaintiff's interests with principles of equity, comity and federalism. Yet in applying this balancing approach, it has in fact introduced a definitional test which depends on whether a state prosecution is "pending." This approach not only avoids examining fundamental issues as to the nature and effect of declaratory and injunctive remedies, but, as *Hicks* illustrates, it introduces other problems which further confuse these issues. Certainly, the issues glossed over in *Steffel*—article III problems, the question of superseding state action, and res judicata considerations—affect principles of equity, comity and federalism. The Court should consider these issues before determining the final balance. Until the Court does so, however, counsel for a federal plaintiff seeking anticipatory relief must chart a careful course be-

76. The rule against advisory opinions is embedded in our history as well as in the policies of separation of powers implicit in article III. *See* 3 H. JOHNSTON, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (1891) (correspondence between Secretary of State Jefferson and Chief Justice Jay); Alabama v. Arizona, 291 U.S. 286, 291 (1934); Muskrat v. United States, 219 U.S. 346 (1911).

77. At least one commentator has agreed with Justice Rehnquist, however. *See* Comment, Steffel v. Thompson: *Federal Declaratory Relief and the State Criminal Process—A Compromise of Comity and Primacy,* 9 U. SAN. FRAN. L. REV. 87, 108 (1974). The author argues that Justice White's approach would "bootstrap" injunctive relief without the requisite showing of bad faith harassment. The net result presumably would be an impermissible intrusion in violation of comity principles. The fallacy of this argument is that it presupposes that a declaratory judgment will be ineffective without a subsequent injunction. As Justice Brennan has pointed out, however, even with uncertain res judicata effects, a declaratory judgment can have a profound effect on state officials and lead to a reassessment of their position vis-à-vis the federal plaintiff. *See* 415 U.S. at 470–71.

tween the Scylla of *Dombrowski* and *Younger* and the Charybdis of *Samuels* and *Steffel*.

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ERRATUM

1. Footnote 149 of *School Finance in Washington—The* Northshore *Litigation and Beyond*, 50 WASH. L. REV. 853, 887 (1975), by William R. Andersen, should read: "Justice Weaver added a short concurring opinion of his own."